Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

IN RE: FELICIANO LEJANO AND MELINDA LEJANO,
Plaintiffs-Applicants

On Petition For Writ Of Mandamus

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

I. Whether or not a United States District Court may usurp the jurisdiction of a State Court of a seaman's maritime personal injury case by denying remand to the State court where the basis of removal was an alleged federal question under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, attempting to enforce a forum selection clause found in a seaman's contract of employment despite the legislatively mandated seaman's contract exclusion contained in 9 U.S.C. § 1 which exclusion was adopted in the definition of **commercial** by Congress in its declaration ratifying the Convention on the Recognition on the Enforcement of Foreign Arbitral Awards.

LIST OF PARTIES

The parties to the action are Feliciano Lejano, Melinda Lejano, K.S. Bandak, Assuranceforeningen Gard, K.S. Bandak, II, A.S. Borgestad and A.S. Borgestad Shipping.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Feliciano Lejano and Melinda Lejano respectfully pray that Writs of Mandamus and Prohibition issue herein to review the Order and Opinion of the United States District Court for the Eastern District of Louisiana entered on November 3, 2000, and the Order of the United States Court of Appeals Order refusing to review the lower court's decision dated December 19, 2000.

OPINIONS BELOW

All opinions below are contained in the appendices to this Petition. The Judgment and Opinion of April 27, 2000 of the district court, the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, is reproduced in the Appendix, App. 16. The Opinion of the Court of Appeal for the Fifth Circuit of the State of Louisiana of June 30, 2000 denying defendants' writ application is contained in the Appendix, App. 32. The Order and Reasons of the United States District Court for the Eastern District of Louisiana of November 3, 2000 denying applicants' Motion for Remand is contained in the Appendix, App. 2. The Opinion and Reasons of the United States District Court for the Eastern District of Louisiana of December 6, 2000, denying applicants' Motion for New Trial is contained in the Appendix, App. 13. The Order of the United States Court of Appeals for the Fifth Circuit of December 19, 2000 denying applicants' Petition for Issuance of Writs of Mandamus and Prohibition is contained in the Appendix, App. 1.

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals for the Fifth Circuit was entered on December 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a).

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

9 U.S.C. § 1-14 (App. 35) and 9 U.S.C. § 201-208 (App. 43)

STATEMENT OF CASE

The basic facts necessary to understand the issue presented are succinctly set forth in the reasons of the Louisiana State District Court in setting this case for trial prior to the removal of this case to the Federal system:

> "On November 7, 1991, Feliciano Lejano ("Lejano"), a Filipino seaman working aboard the M/V Bandak, was severely injured when a rope broke on a suspended scaffold causing him to fall thirty feet to the deck below. The accident occurred when the Norwegian vessel, owned and operated by the Norwegian limited partnership K.S. Bandak, was in international waters off the coast of Florida. The parties agree he was in the course and scope of his employment on the M/V Bandak. His service on the vessel was

pursuant to an individual contract and collective bargaining agreement that included a forum selection clause. As a result of the accident, Lejano suffered quadriplegia and brain damage among other injuries. He was hospitalized a few months in Florida before being transferred to a hospital in the Philippines where he remained until his initial discharge on October 2, 1992. Lejano had a stroke and remains hospitalized.

On September 16, 1993, Lejano and Melinda Lejano (hereinafter, collectively "the plaintiffs") filed suit against K.S. Bandak and its foreign insurers Assuranceforeningen Gard and Gard (U.K.) Ltd. seeking recovery under the Jones Act, General Maritime Law and Federal Maritime Law. Plaintiffs obtained *quasi-in-rem* jurisdiction by executing a non-resident writ of attachment on the M/V Bandak in September of 1993 while it was docked within the jurisdiction of this court. By amended petitions, plaintiffs added as defendants K.S. Bandak II, the owner of the vessel at the time of the attachment, A.S. Borgestad and A.S. Borgestad Shipping. Defendants posted $8.75M in security for the release of the vessel.

On August 3, 1994, Judge Walter Kollin of this court granted peremptory exceptions and dismissed plaintiffs' suit on the basis of *forum non conveniens*. Plaintiffs appealed, and on March 1, 1995, the Fifth Circuit reversed and remanded on finding that plaintiffs had stated a cause of action and were afforded a right of action. The appellate court further found that the doctrine of *forum non conveniens* did not apply in this Jones Act case.

On remand, defendants filed a motion for partial summary judgment requesting that Norwegian substantive law be held applicable. Lejano's employment contract contained a forum selection provision providing that suit may be brought in either the Philippines or Norway. On September 21, 1995, this court upheld the forum selection provision and ruled that the case be governed by either Norwegian or Philippine law. The court ordered plaintiffs to file their case in either forum and to satisfy the court with proof that the claim had been filed. The trial court conditionally dismissed plaintiffs' claims without prejudice, stating that the court would proceed to adjudicate the claim applying Philippine or Norwegian law if plaintiffs could show that defendants were frustrating their efforts to pursue this claim in a foreign forum.

Thereafter plaintiffs filed a motion for new trial which this court denied and the Fifth Circuit denied on writ of review. On remand to the Fifth Circuit from the Louisiana Supreme Court, plaintiffs argued that this court and the Fifth Circuit erred in failing to apply the doctrine of law of the case. Plaintiffs contended that in a prior judgment this court had ruled on the forum selection clause's validity and held the clause unenforceable. The plaintiffs argued that the court cannot rule again on the enforceability of the forum selection clause. Plaintiffs further argued that the cause of action had prescribed in both Norway and the Philippines. The Fifth Circuit affirmed the trial court's denial of the new trial motion. *Lejano v. K.S. Bandak*, 95-1011 (La. App. 5 Cir. 1/15/97); 688 So.2d 86. In so doing, the Fifth Circuit found that the forum

selection clause had not previously been squarely before the court; the Fifth Circuit also held that the doctrine of law of the case is discretionary and is not applicable if manifest injustice would occur. *Id.* at 88 (citing *Vincent v. Ray Brandt Dodge*, 94-291 (La. App. 5 Cir. 3/1/95); 652 So.2d 84, *writ denied*, 95-1247 (La. 6/30/95); 657 So.2d 1034). The appellate court also sanctioned the *conditional dismissal* of the case:

> '[I]t appears from the record before us that the plaintiff's cause of action may be subject to pleas of prescription if now brought in the appropriate forum. For that reason, we agree with the trial judge's decision, which amounts to a stay of the present proceedings rather that an outright dismissal of the case so that Mr. Lejano may bring his claim in either the Philippines *or* in Norway.'

Id at 91 (emphasis added).

Thereafter the Louisiana Supreme Court affirmed the judgment of the trial court. 97-0388 (La. 12/12/97); 705 So.2d 158, 169. The Court found that then existing statutes and public policy did not forbid enforcement of the forum selection clauses in the maritime law. The United States Supreme Court declined to review the Louisiana Supreme Court decision. ___ U.S. ___, 142 L.Ed.2d 40 (1998).

On August 14, 1998, plaintiffs filed a claim with the Philippine National Labor Relations Commission ("NLRC"). On November 26, 1998, the Labor Arbiter dismissed the case on grounds that it had prescribed under the three and four year prescription periods and that the prescription could not be waived. Further confusion

> comes from the Appellate NLRC reversing the Labor Arbiter and ruling that the case had not prescribed. *Lejano v. Soriamont Steamship Agencies, et al.*, 98-08-0900 (NLRC NCR, Republic of Philippines 6/17/99). Final resolution of the issue seems impossible.
>
> On December 4, 1998, plaintiffs filed the instant motion to set this matter for trial. The court held an evidentiary hearing on May 13, 1999 and took the matter under advisement to permit the parties to file responsive memoranda and to supplement the record. This matter was held in abeyance at the parties' request from July 27, 1999 to November 16, 1999 to permit the parties to investigate the status of the Philippine action. They have since asked the court to rule." (App. 18-22)

The April 27, 2000 opinion of the state district court setting the case for trial was entered after an evidentiary hearing that had been requested by the defendants. The state district court, applying Federal standards, found enforcement of the forum selection clause would be unreasonable under the circumstances of this case:

> "The *Bremen* Court further held that forum selection clauses are prima facie valid and should be enforced 'unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances." 407 U.S. at 10, 92 S.Ct. at 1913. This court finds plaintiffs have met their burden to show that enforcement of the forum selection clause would be unreasonable under these circumstances. First, the court finds, based on the evidence presented by credible experts Drs. Eugenio Alcazaren and Ernesto Villavert, that Lejano has likely not reached maximum medical cure from his accident-

related injuries and that he requires follow-up care to prevent another stroke. The court also accepts the affidavit testimony by Dennis Shafer that Lejano's medical expenses since October 2, 1992 are not being met, i.e. that approximately 794,824 Philippine pesos ("PhP") (US$21,000.00) in medical payments advanced by plaintiffs' counsel have not been reimbursed and that an additional PhP1,000,000 in unpaid medical bills have been incurred. Accordingly, the court expressly finds the denial of medical payments to this seaman to be an unreasonable circumstance rebutting the prima facie validity of the forum selection clause.

The *Bremen* Court also stated that 'it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.' 407 U.S. at 18, 92 S.Ct. at 1917. Due to his deteriorating health and the rate at which matters are progressing, plaintiff may well never have his day in court. This court believes that plaintiff has carried his burden to show that trial in the Philippines will be so gravely difficult and inconvenient that he is for all practical purposes being deprived of his day in court.

Second, the taciturn nature of the Philippine courts on the issue of prescription in this case is an unreasonable circumstance when Lejano requires resolution of this cause of action. Based on the medical testimony above, the court finds that Lejano may die before the Philippine courts have resolved this issue." (App. 26-27)

* * *

> "Therefore under the *Bremen* rationale, the forum selection clause is unenforceable because its enforcement under these circumstances would be unreasonable." (App. 28)

The trial was scheduled to commence in State court on November 6, 2000. The shipowner sought review of the district court's opinion from the Louisiana State Fifth Circuit Court of Appeal which denied the shipowner's writ application thereby affirming the decision of the state district court. (App. 32) The shipowner's writ application was pending before the Louisiana Supreme Court when the shipowner improvidently removed the case on October 6, 2000, to the United States District for the Eastern District Court of Louisiana. The basis of the removal was alleged federal question jurisdiction by virtue of the seaman's employment contract containing the forum selection clause and the shipowner's allegation that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 was applicable.

After removal from the state court, applicants immediately filed a Motion to Remand asserting that the removal was improper because federal question jurisdiction did *not* exist by virtue of the fact that the Convention was explicitly not applicable to seamen's contracts of employment. The United States District Court for the Eastern District of Louisiana denied applicants' Motion to Remand finding the seamen's contract exclusion contained in 9 U.S.C. § 1 not to be applicable because of a statutory conflict between 9 U.S.C. § 202 and 9 U.S.C. § 2. (App. 2) *Rehearing was denied on December 8, 2000, with the district court refusing to even consider the legislative history*

of the Convention which expressly provides that the definitions of 9 U.S.C. § 1 containing the seamen's contract of employment exclusion were applicable to the Convention. (App. 13) Applicants' Petition for Issuance of Writs of Mandamus and Prohibition were summarily denied by two (2) judges of the United States Court of Appeals for the Fifth Circuit. (App. 1)

ARGUMENT

The grounds for removal cited by the defendants were the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 203, 209, alleged to be, in this context, federal question jurisdiction. Because this case is not within the scope of the Convention, there is no federal question jurisdiction as required in 9 U.S.C. § 203, and removal was therefore patently improper under 9 U.S.C. § 205.

Chapter One of Title 9, "Arbitration" was initially enacted in 1924 " . . . to overcome American courts' common law hostility to the arbitration of disputes." *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (PEMEX)*, 767 F.2d 1140 (5CA 1985). Chapter One provides for arbitration for certain **maritime transactions** and other disputes arising out of **commerce** as defined in 9 U.S.C. § 1 to wit:

> " '**Maritime transactions**' as herein defined, means charter parties, bills of lading of water carriers, agreements relative to wharfage, supplies furnished on vessels or repairs to a vessel, collisions, or any other matters in foreign commerce which, if the subject of controversy,

> would be embraced within admiralty jurisdiction; '**commerce**' as herein defined, means commerce among the several states or the foreign nations . . . , **but nothing herein contained shall apply to contracts of employment of seamen**, railway workers or any other class of workers engaged in foreign or interstate commerce." (Emphasis added)

The Convention, approved by Congress, to be effective December 7, 1970, is contained in Chapter Two, 9 U.S.C. § 201. The Convention provides much broader coverage than Chapter One and is not limited to **maritime transactions** or contracts involving transactions in **commerce**. The Convention is not limited to **commercial** disputes, but applies explicitly to any award not considered domestic by the nation where enforcement is sought. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale Law Journal Vol. 1049, 1061 (1961). *See also*, Senate Report No. 91-702, 91st Congress, 2d Session, Pg. 6 ["Paragraph 1 of Article I of the Convention provides that the Convention applies to the recognition and enforcement of arbitral awards without any limitation as to the nature of the relationship that gave rise to the award"]. The United States, in adopting the Convention, exercised the reservation allowed by Article I(3) of the Convention, which permits a state to apply the Convention only to legal relationships that are considered **commercial** under the national law of that state. In adopting the Convention, the United States did so with the following declaration:

> "The United States of America will apply the Convention ***only*** to differences arising out of

> legal relationships, whether contractual or not, which are considered as **commercial** under the **national law** of the United States." (Emphasis added) (9 U.S.C. § 201, Note 58)

The Committee on Foreign Relations, in considering Senate Bill 3274 to implement the Convention, made it absolutely clear that the definition of commerce (which, according to 9 U.S.C. § 1, excludes therefrom seamen's employment contracts) was the **national law** definition for the purpose of the **declaration** ratifying the Convention:

> "The letter to the Vice President transmitting the legislation explains the reason for the change in plans, which was basically to avoid the confusion which might result from a series of minor changes in the different sections of the Arbitration Act as between cases falling under the act in its present form and cases falling under the Convention.
>
> The kind of problem that we wished to avoid is well illustrated by section 202 of the new chapter 2. This section defines the arbitral agreements or awards that are considered to fall under the Convention for purposes of the implementing legislation.
>
> Paragraph 1 of article I of the Convention provides that the Convention applies to the recognition and enforcement of arbitral awards without any limitation as to the nature of the relationship that gave rise to the award. It might, for example, be a question of family status. However, paragraph 3 of article I of the Convention permits a state party to the Convention to file a declaration that the Convention

will apply only to legal relationships that are considered as **commercial** under the national law of that state. *As was stated in the hearings on the Convention, the United States will file such a declaration because our purpose in adhering to the Convention is for the beneficial effects it will produce for the foreign commerce of the United States and not make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union.*

Consequently it is necessary to include the substance of this limiting declaration in the legislation that implements the Convention. This is what the first sentence of section 202 intends. It was not, of course, necessary to make any reference to the national law of the United States in the first sentence of section 202 because the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration. A specific reference however, is made in section 202 to section 2 of title 9, which is the basic provision of the original Arbitration Act.

* * *

The declaration limiting the application of the Convention to commercial matters applies both to the recognition and enforcement of arbitral awards under article 1 of the Convention and to the recognition of an agreement to arbitrate under article 2 of the Convention. Consequently the provisions of section 202 or the implementing legislation are applied specifically both to enforcement of arbitration agreements and arbitral awards." (Emphasis

added) S. Report No. 91-702, 91st Congress, 2d Session, Pg. 5-7

The legislative history of the enactment of the Convention clearly establishes that the exclusion of employment contracts for seamen contained in 9 U.S.C. § 1 is read into the provisions of 9 U.S.C. § 202, and is further consistently evidenced by the commentators' discussions of Section 202 of the Convention. *See for e.g.*, McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 Journal of Maritime Law and Commerce 735, 743-744 (1971) ["The United States has ratified subject to the **commercial** matters reservation and the statute reflects its decision to do so; however, the Act does not define **commercial** relationships. The legislative history indicates that the definition of commerce contained in section 1 of the Federal Arbitration Act of 1925 is the national law definition of "commercial" for purposes of the reservation."]; *see also*, Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 California Western International Law Journal 67, 74 (1971) ["There was no need to provide for a definition for commerce in Section 202 because there is already a definition in Section 1 of the original Arbitration Act. That definition refers both to interstate and foreign commerce."]. Thus, it is clear that seamen's maritime contracts do not arise out of a **commercial** legal relationship, thereby precluding application of the Convention as acceded to by the United States in cases involving seamen's contracts.

The decision of the District Court in holding the Convention applicable to a seaman's contract of employment is an unauthorized assertion of jurisdiction and

improperly expands the jurisdiction of the United States District Courts without any basis in law, wrongfully depriving a state court of its jurisdiction of a seaman's maritime personal injury claim brought under the savings to suitors clause of 28 U.S.C. § 1333. Since the Convention was ratified by the United States on December 29, 1970, no other Federal Court has ever found the definitions of 9 U.S.C. § 1 not to be included within the provisions of the Convention, 9 U.S.C. § 201, et seq. Previously, United States Courts have always held that the provisions of 9 U.S.C. § 1 were applicable to the Convention, 9 U.S.C. § 201 et seq. *See, for e.g., Star-Kist Foods, Inc. v. Diakav Hope, S.A.*, 423 F.Supp. 1220 (D.C. Cal. 1976) [where the court specifically used the definitions contained in 9 U.S.C. § 1 in enforcing an arbitration agreement under 9 U.S.C. § 201)]. In *Sedco, supra,* Judge Brown noted that " . . . the Convention replicates the Federal Arbitration Act. Indeed, Section 208 of the enabling legislation of the Convention incorporates all of the Convention into Chapter One of Title 9."

CONCLUSION

Applicants request that this Court issue a writ of mandamus to the United States Court of Appeals for the Fifth Circuit directing it to issue a writ of prohibition to prevent the District Court from improperly asserting jurisdiction in this case because the legislative history clearly establishes that the Convention is not applicable to those **commercial** matters as defined in 9 U.S.C. § 1, specifically excluding maritime contracts of employment. Applicants further request this Court to issue appropriate

writs of mandamus to compel an ultimate remand of this improperly removed maritime personal injury claim back to Louisiana State Court.

Respectfully submitted:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31438

In Re: FELICIANO LEJANO; MELINDA LEJANO

Petitioners

Petition for Writ of Mandamus and Prohibition
to the United States District Court for the
Eastern District of Louisiana, New Orleans

(Filed Dec. 19, 2000)

Before EMILIO M. GARZA and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the petition for writ of prohibition, is DENIED.

*This order is being entered by a quorum of this court pursuant to 28 U.S.C. Section 46(d).

App. 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FELICIANO LEJANO and MELINDA LEJANO	*	CIVIL ACTION NO. 00-2990
VERSUS	*	SECTION "F"
K.S. BANDAK, ASSURANCEFORENINGEN GARD, and GARD (U.K.) LTD.	*	

ORDER AND REASONS

(Filed Nov. 3, 2000)

Before the Court is the plaintiffs' motion to remand. For the reasons that follow, the motion is DENIED.

Background

On November 7, 1991, Feliciano Lejano, a Philippine citizen and resident, was severely injured in an accident while working as a seaman on board the M/V BANDAK, a Norwegian vessel. At the time of the accident, Lejano was working under the terms of a standard Philippine Overseas Employment Administration (POEA) contract. Because of the injuries he sustained, Lejano and his wife failed a seaman's personal injury lawsuit in Louisiana state court.[1] The case comes to this Court by way of

[1] The parties dispute the seriousness of Lejano's medical condition. The plaintiffs assert that Lejano is on the verge of death and might never get his day in court. The defendants dispute this contention and maintain that the plaintiffs' own expert has estimated Lejano's life expectancy at approximately 22 years from the accident (now about twelve years).

removal pursuant to federal question jurisdiction.

Because of the nature of the proceedings leading up to removal, a brief description of the procedural history is necessary. On September 16, 1993, the plaintiffs filed a seaman's personal injury lawsuit in the 24th Judicial District Court, State of Louisiana. Although the trial court initially dismissed the lawsuit on forum non conveniens grounds, the Louisiana 5th Circuit Court of Appeal reversed and remanded the case, finding that the plaintiffs stated a cause of action and that forum non conveniens did not apply. On September 21, 1995, the trial court dismissed the lawsuit, holding that the forum selection clause in Lejano's employment agreement was valid and that the plaintiffs were required to file their lawsuit in the Philippines or Norway. The court of appeals denied a motion for new trial and the Louisiana Supreme Court affirmed the decision on December 12, 1997. However, the Supreme Court allowed the trial court to retain jurisdiction over the case so that the matter could be tried in Louisiana if the plaintiffs could show that pursuit of their claims in the foreign forum was frustrated.

On August 14, 1998, plaintiffs filed a complaint against the defendants before the Philippine National Labor Relations Commission (NLRC). The Labor Arbiter subsequently dismissed the proceeding, finding that the plaintiffs' claims had prescribed. Because of the dismissal, the plaintiffs went back to the state trial court in December 1998, and sought to re-open the case and set a trial date. On June 17, 1999, the NLRC reversed the decision dismissing the arbitration compliant and remanded the case back to the labor arbiter. As a result, the state trial court did not rule on plaintiffs' motion to

re-open until the parties had an opportunity to investigate the status of the Philippines arbitration. However, on April 27, 2000, the Louisiana trial court granted plaintiffs' motion and set a trial date for November 6, 2000. The court of appeals affirmed the decision and the Louisiana Supreme Court has taken the matter under consideration.[2] Then, on October 6, 2000, the defendants removed the case to this Court.[3]

As grounds for removal, the defendants rely on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08. Plaintiffs now move to remand the action claiming that the Convention does not apply to this case, and therefore, the Court lacks subject matter jurisdiction.

Law and Analysis

Although the plaintiffs challenge removal in this case, the removing defendants have the burden of showing the propriety of this Court's removal jurisdiction. *See Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 192, 126 L.Ed.2d 150 (1993); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). In addition, any ambiguities are construed against removal, *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979), as the removal statute should be strictly construed in favor of remand. *York v. Horizon Fed. Sav. and Loan Ass'n*,

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[2] These proceedings have been stayed due to defendants' removal.

[3] The plaintiffs have since dismissed their arbitration complaint in the Philippines.

712 F.Supp. 85, 87 (E.D. La. 1989); *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

The plaintiffs make several arguments for remand. First, the plaintiffs claim that the Convention does not apply because employment contracts of seamen are specifically excluded from coverage. Second, the plaintiffs urge that even if the Convention somehow applies to this case, the defendants have not satisfied the requirements set out by the Convention. Finally, the plaintiffs contend that the defendants have waived their right to seek arbitration and remove the case to this Court because the removal comes too long after the case was filed.

A. Exclusion of Employment Contracts of Seamen

The plaintiffs assert that the claims in this case arise out of Lejano's employment contract with the defendant and that such employment contracts are specifically excluded from the Convention's coverage under 9 U.S.C. § 1.[4] The Court does not agree.

9 U.S.C. § 202 crafts the coverage of the Convention. Specifically, it provides that:

---

[4] Title 9 of the United States Code deals with arbitration and is divided into three chapters. The Court is only concerned with the provisions from the first two chapters. Chapter 1 (9 U.S.C. §§ 1-16) addresses domestic arbitration agreements. Chapter 2 (9 U.S.C. §§ 201-8) covers foreign arbitration agreements. However, provisions from Chapter 1 apply to Chapter 2 to the extent that the provisions from Chapter 1 are not in conflict with the provisions of Chapter 2 or the Convention. 9 U.S.C. § 208.

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.

9 U.S.C. § 2 further provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 1, which defines maritime transactions and commerce as set out in § 2, goes on to exclude "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

While § 1 of Chapter 1 specifically excludes employment contracts of seamen, § 208 of Chapter 2, which incorporates Chapter 1 into the Convention, only allows an application of Chapter 1 and its sections "to the extent that the chapter is not in conflict with this chapter or the Convention as ratified by the United States." The Court finds that the § 1 exclusion is in conflict with Chapter 2 and the Convention.

Section 202 refers to "a legal relationship . . . which is considered as commercial, including a transaction, contract or agreement described in section 2 . . . " § 2 refers to "maritime transaction or a contract evidencing a transaction involving commerce . . . " It appears that § 202 covers all legal relationships that are commercial, while § 2, defined by § 1, limits transactions involving commerce by excluding from Chapter 1 coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Because the Court finds that these two provisions are in conflict, § 1 of Chapter 1 is not applicable to the Convention by virtue of § 208. Furthermore, the Court notes that:

> The goal of the convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S.Ct. 2449, 2457, 41 L.E.2d 270 (1974). Here, the Philippine government has set up a system whereby disputes involving seamen employment contracts are governed by an arbitration tribunal, namely the NLRC. Thus, an application of the § 1 exclusions would thwart the goal of the Convention as stated by the Supreme Court in *Scherk*. Such a conflict is not permitted by § 208.

B. Convention Prerequisites

The plaintiffs also maintain that the defendants have not met the requirements set out by the Convention, and therefore, the Convention does not apply and the Court lacks subject matter jurisdiction. In order to determine that the Convention applies to an arbitration agreement, the Court must find that the following elements are satisfied: 1) there is an agreement in writing to arbitrate the subject of the dispute; 2) the agreement provides for arbitration in the territory of a signatory of the Convention; 3) the agreement arises out of a commercial legal relationship; and 4) the party to the agreement is not an America Citizen or the commercial relationship has some relation with one or more foreign states. 9 U.S.C. § 201, *et seq.*

i. Agreement in Writing to Arbitrate

For the Convention to apply, there must be an agreement, in writing, to arbitrate. The Court finds that such an agreement exists. Not only does Lejano's employment contract contain a agreement in writing to arbitrate, but the plaintiffs' subsequent filing of a compliant before a Labor Arbiter at the NLRC constitutes an agreement in writing to engage in arbitration.

Section I of the Revised Standard Employment Contract provides that "[t]he Philippines Overseas Employment Administration (POEA) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this contract." The fact that the POEA, most of whose functions have been

transferred to the NLRC, has exclusive jurisdiction over any disputes arising out of the employment contract implies that arbitration is mandatory. The NLRC is an arbitration tribunal which hears labor disputes certified for "compulsory arbitration under Article 263(9) of the Labor Code." Rule IX of the NLRC Rules of Procedure.

The Court also finds that the plaintiffs' filing of a compliant before the NLRC constitutes an agreement in writing to arbitrate. On August 14, 1998, the parties filed a compliant before a Labor Arbiter at the NLRC. Thus, they submitted to the jurisdiction of the arbitration panel. There can be no greater proof of an agreement to arbitrate than the filing of a complaint with an arbitration tribunal. See *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980).[5]

ii. Arbitration in Territory of Signatory County

As the Court has already stated, the POEA contract mandates that the POEA has exclusive jurisdiction over issues arising out of the employment contract. It is inherent that any arbitration that might occur, would be held in the Philippines. The POEA is indisputably a Philippine agency and the NLRC, which carries out the arbitration

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[5] This agreement is beyond the terms of the employment contract and would invoke the application of the Convention regardless of any exceptions urged by the plaintiffs. See *Donald Endriss v. Eklof Marine Corp.*, 1999 AMC 556 (S.D.N.Y. 1998) (agreement to arbitrate after accident not part of seaman's employment contract, and therefore, not subject to exclusions of 9 U.S.C. § 1.)).

requirement of the POEA contracts, is also a branch of the Philippine Department of Labor.

iii. Commercial Legal Relationship

An employment contract constitutes a commercial legal relationship as required by 9 U.S.C. § 202. See *Prograph International, Inc. v. Barhjydt*, 928 F.Supp. 983, 988 (N.D. Cal. 1996). The only argument that no commercial relationship existed was premised on the seaman employment contract exclusion of § 1. The Court has already found that this exclusion does not apply to the Convention.

iv. Non-American Citizen or Relationship with Foreign State

There is no dispute as to this element. The dispute is entirely between foreign citizens.

C. Waiver

Finally, the plaintiffs assert that the defendants waived their right to seek arbitration because they waited until one month before the trial to remove this case under the Convention. However, plaintiffs seem to ignore § 205 of Chapter 2.

As grounds for removal, defendants rely on the enabling legislation for the enforcement of the Convention. Section 205 provides:

> Where the subject matter of an action or proceeding pending in a Sate court relates to an

> arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

9 U.S.C. § 205. Thus, defendants who removed under the Convention are not limited by the usual thirty day window in which to petition for removal. The plaintiffs assert that a common sense reading of the statute suggests that "at any time before the trial" does not include one month prior to trial on a case that has been litigated since 1993. The Court does not agree and finds that § 205 leaves no room for interpretation. Thus, removal in this case was timely under the Convention.[6]

Congress dictated the removal procedures when it enacted the enabling statute. Looking to § 205, the Court finds that the suit is removable. The claims arise from an arbitration agreement that is valid under the Convention. This is all that § 205 requires for removal. thus, the defendants have met their burden of persuasion. They have sufficiently demonstrated that removal was proper

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[6] See *Seaport Shipping Corporation v. West of England Ship Owners Mutual P&I Assoc.*, No. 88-4605, 1998 WL 135179 (E.D.La. Dec. 12, 1998) ("Nothing could be plainer that [sic] the language of 9 U.S.C. 205, which . . . provides that in cases involving arbitration agreements, 'the defendants may, at any time before trial thereof, remove' to federal court.")).

in this case. The Court, however, reserves the question of whether this action must be stayed pending arbitration.[7]

Accordingly, the plaintiffs' motion to remand is DENIED. New Orleans, Louisiana, November 3, 2000.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[7] Defendants have submitted a motion to stay pending arbitration to be heard on November 8, 2000, on the papers. Since the filing of this motion the plaintiffs have dismissed their compliant before the arbitration panel. The Court makes no ruling on the effect of the dismissal on the pending motion to stay.

MINUTE ENTRY
FELDMAN, J.
December 6, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FELICIANO LEJANO AND MELINDA LEJANO	*	CIVIL ACTION
	*	NO. 00-2990
VERSUS	*	SECTION "F"
K.S. BANDAK, ASSURANCEFORENINGEN GARD, AND GARD (U.K.) LTD.	*	(Filed Dec. 6, 2000)

Before the Court is plaintiffs' motion for reconsideration or alternatively for interlocutory appeal. For the reasons that follow, both motions are DENIED.

On November 6, 2000, the Court issued an Order and Reasons denying plaintiffs' motion to remand. In that Order, the Court found that removal was proper because plaintiffs' claims "arise from an arbitration agreement that is valid under the Convention."[1] The plaintiffs now move for reconsideration of that Order of alternatively to have the issue certified for interlocutory appeal under 28 U.S.C. § 1292(b).

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[1] The Convention on the Recognition of Foreign Arbitral Awards, 9 U.S.C. § 201-08.

I. Motion for Reconsideration

Because the present motion for reconsideration was filed within ten days of entry of judgment and questions the correctness of the Court's ruling, the Court treats it as a motion under Federal Rule of Civil Procedure 59(e). *See, e.g., U.S. v. Deutsch*, 981 F.2d 299 (7th Cir. 1992) (substantive motion served within ten days is treated as a motion under 59(e)); *U.S. v. One Dodge Pickup*, 959 F.2d 37 (5th Cir. 1992) (motion that calls into question the correctness of the court's ruling is treated as a motion under Rule 59(e)).

Because of interest in finality, motions for reconsideration may only be granted if the moving party shows there was a mistake of law or fact or presents newly discovered evidence that could not have been discovered previously. *Deutsch v. Burlington Northern R. Co.*, 983 F.2d 741 (7th Cir. 1993). Moreover, Rule 59 motions should not be used to relitigate old matters, raise new arguments, or submit evidence that could have been presented earlier in the proceedings. See *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990).

The plaintiffs' arguments in this motion are essentially the same as the arguments that they asserted in their motion to remand. There has been no clarification of issues or new evidence that persuades the Court to vacate its earlier judgment. Thus, the Court DENIES plaintiffs' motion for reconsideration on the motion to remand.[2]

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[2] The plaintiffs claim that the Court was incorrect in denying the motion to remand because the Court did not consider the legislative history of the adoption of the

II. Interlocutory Appeal

Alternatively, the plaintiffs seek an interlocutory appeal of the Court's denial of the motion to remand. The certification of interlocutory orders for appeal is governed by 28 U.S.C. § 1292(b). To certify an issue for interlocutory appeal, it must involve: (1) a controlling question of law, (2) substantial ground for a difference of opinion, and (3) a question whose immediate appeal from the order may materially advance the ultimate termination of the litigation. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 n. (5th Cir. 1981). Section 1292(b) "is meant to be applied in relatively few situations and should not be read as a significant incursion on the traditional federal policy against piecemeal appeals." *Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984).

The Court finds that plaintiffs set forth no valid justification for certifying the Court's previous order for interlocutory appeal. They have not shown that an appeal will advance the termination of the litigation or that there is a controlling issue of law as to which there is a substantial ground for difference of opinion.[3]

Accordingly, plaintiffs' motion for reconsideration or alternatively for certification under 28 U.S.C. § 1292 is DENIED.

Convention. The Court finds this argument without merit. Legislative history is irrelevant when the terms of the statute at issue are clear and unambiguous.

[3] The Court notes the plaintiffs' failure to cite any case law in support of their motion for interlocutory appeal.

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NUMBER: 454-127 **DIVISION "D"**

FELICIANO LEJANO AND MELINDA LEJANO
VS.
K.S. BANDAK,
ASSURANCEFORENINGEN GARD, AND
GARD (U.K.) LTD.

FILED: April 27, 2000 **/s/ Gordon [Illegible]**
DEPUTY CLERK

ORDER

The above-captioned matter came before the court on plaintiffs' Motion to Set for Trial filed herein on December 4, 1998. Following an evidentiary hearing requested by defendants, the court took the matter under advisement to permit the parties to file responsive memoranda and to supplement the record.

Considering now the law, the entire record, the evidence adduced and the memoranda and argument of counsel, the court finds plaintiffs are entitled to have the matter reset for trial for the written reasons assigned this date and made part hereof.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's Motion to Set for Trial be and the same is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that counsel for plaintiffs and defendants schedule a status conference with the court, at which time, a pretrial conference will be scheduled and this matter assigned for trial.

ORDER READ AND SIGNED, this 27th day of April, 2000 at Gretna, Louisiana.

/s/ Robert M. Murphy
JUDGE

NOTICE INFORMATION ON PAGE TWO.

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TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA
NUMBER: 454-127 DIVISION "D"

FELICIANO LEJANO AND MELINDA LEJANO

VS.

K.S. BANDAK,
ASSURANCEFORENGEN GARD, AND
GARD (U.K.) LTD.

FILED: April 27, 2000 /s/ [Illegible]
DEPUTY CLERK

REASONS

STATEMENT OF THE CASE:

On November 7, 1991, Feliciano Lejano ("Lejano"), a Filipino seaman working aboard the M/V Bandak, was severely injured when a rope broke on a suspended scaffold causing him to fall thirty feet to the deck below. The accident occurred when the Norwegian vessel, owned and operated by the Norwegian limited partnership K.S. Bandak, was in international waters off the coast of Florida. The parties agree he was in the course and scope of his employment on the M/V Bandak. His service on the vessel was pursuant to an individual contract and collective bargaining agreement that included a forum selection clause. As a result of the accident, Lejano suffered quadriplegis and brain damage among other injuries. He was hospitalized a few months in Florida before being transferred to a hospital in the Philippines where he remained until his initial discharge on October 2, 1992. In 1999, Lejano had a stroke and remains hospitalized.

On September 16, 1993, Lejano and Melinda Lejano (hereinafter, collectively "the plaintiffs") filed suit against K.S. Bandak and its foreign insurers Assuranceforeningen Gard and Gard (U.K.) Ltd. seeking recovery under the Jones Act, General Maritime Law and Federal Maritime Law. Plaintiffs obtained *quasi-in-rem* jurisdiction by executing a non-resident writ of attachment on the M/V Bandak in September of 1993 while it was docked within the jurisdiction of this court. By amended petitions, plaintiffs added as defendants K.S. Bandak II, the owner of the vessel at the time of the attachment, A.S. Borgestad and A.S. Borgestad Shipping. Defendants posted $8.75M in security for the release of the vessel.

On August 3, 1994, Judge Walter Kollin of this court granted peremptory exceptions and dismissed plaintiffs' suit on the basis of *forum non conveniens*. Plaintiffs appealed, and on March 1, 1995, the Fifth Circuit reversed and remanded on finding that plaintiffs had stated a cause of action and were afforded a right of action. The appellate court further found that the doctrine of *forum non conveniens* did not apply in this Jones Act case.

On remand, defendants filed a motion for partial summary judgment requesting that Norwegian substantive law be held applicable. Lejano's employment contract contained a forum selection provision providing that suit may be brought in either the Philippines or Norway. On September 21, 1995, this court upheld the forum selection provision and ruled that the case was governed by either Norwegian or Philippine law. The court ordered plaintiffs to file their case in either forum and to satisfy the court with proof that the claim had been filed. The

trial court conditionally dismissed plaintiffs' claims without prejudice, stating that the court would proceed to adjudicate the claim applying Philippine or Norwegian law if plaintiffs could show that defendants were frustrating their efforts to pursue this claim in a foreign forum.

Thereafter plaintiffs filed a motion for new trial which this court denied and the Fifth Circuit denied on writ of review. On remand to the Fifth Circuit from the Louisiana Supreme Court, plaintiffs argued that this court and the Fifth Circuit erred in failing to apply the doctrine of law of the case. Plaintiffs contended that in a prior judgment this court had ruled on the forum selection clause's validity and held the clause unenforceable. The plaintiffs argued that the court cannot rule again on the enforceability of the forum selection clause. Plaintiffs further argued that the cause of action had prescribed in both Norway and the Philippines. The Fifth Circuit affirmed the trial court's denial of the new trial motion. *Lejano v. K.S. Bandak*, 95-1011 (La.App. 5 Cir. 1/15/97); 688 So.2d 86. In so doing, the Fifth Circuit found that the forum selection clause had not previously been squarely before the court; the Fifth Circuit also held that the doctrine of law of the case is discretionary and is not applicable if manifest injustice would occur. *Id.* at 88 (citing *Vincent v. Ray Brandt Dodge*, 94-291 (La.App. 5 Cir. 3/1/95); 652 So.2d 84, *writ denied*, 95-1247 (La. 6/30/95); 657 So.2d 1034). The appellate court also sanctioned the *conditional dismissal* of the case:

> [I]t appears from the record before us that the plaintiff's cause of action may be subject to pleas of prescription if now brought in the appropriate forum. For that reason, we agree

> with the trial judge's decision, which amounts to a stay of the present proceedings rather that an outright dismissal of the case so that Mr. Lejano may bring his claim in either the Philippines *or* in Norway.

Id. at 91 (emphasis added).

Thereafter the Louisiana Supreme Court affirmed the judgment of the trial court. 97-0388 (La. 12/12/97); 705 So.2d 158, 169. The Court found that then existing statutes and public policy did not forbid enforcement of forum selection clauses in maritime law. The United States Supreme Court declined to review the Louisiana Supreme Court decision. ___U.S.___, 142 L.Ed.2d 40 (1998).

On August 14, 1998, plaintiffs filed a claim with the Philippine National Labor Relations Commission ("NLRC"). On November 26, 1998, the Labor Arbiter dismissed the case on grounds that it had prescribed under the three and four year prescription periods and that prescription could not be waived. Further confusion comes from the Appellate NLRC reversing the Labor Arbiter and ruling that the case had not prescribed. *Lejano v. Soriamont Steamship Agencies, et al.*, 98-08-0900 (NLRC [illegible] Republic of Philippines 6/17/99). Final resolution [illegible] the issue seems impossible.

On December 4, 1998, plaintiffs filed the instant motion to set this matter for trial. The court held an evidentiary hearing on May 13, 1999 and took the matter under advisement to permit the parties to file responsive memoranda and to supplement the record. This matter was held in abeyance at the parties' request from July 27,

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1999 to November 16, 1999 to permit the parties to investigate the status of the Philippine action. They have since asked the court to rule.

During the pendency of this proceeding and subsequent to the Louisiana Supreme Court's decision, the Louisiana Legislature declared forum selection clauses to be contrary to public policy. Act 38 of the 1999 Regular Session amended La. R.S. 23:921(A) relative to employment contracts to prohibit restraints on forum unless ratified by the employee after the occurrence of the incident:

> § 921. Restraint of business prohibited; *restraint on forum prohibited;* competing business; contracts against engaging in; provisions for
>
> A. Every contract or agreement, or provision thereof, by which anyone is retrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. *The provisions of every employment contract or agreement or provision thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective ba[illegible]ng agreement, or attempts to enforce either a [illegible] of forum clause and, or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause and, or choice of law clause is expressly, knowingly and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.*

* * *

In the same Regular Session, the Legislature eliminated the Jones Act and federal maritime law exclusion to the *forum non conveniens* dismissal. Act 536 amended Code of Civil Procedure article 123(B) and (C) as follows:

Art. 123. Forum non conveniens

* * *

B. ~~Except as provided in Paragraph C, upon~~ *Upon* the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated ~~solely upon a federal statute and is based~~ upon acts or omissions originating outside *the territorial boundaries* of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court *may* dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article.

C. In the interest of justice, and before the rendition of judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription *that has matured since the commencement of the action in Louisiana,* provided that a suit on the same cause of action *or on any cause of action arising out of the same transaction or occurrence* is commenced in a court of competent

jurisdiction *in an appropriate foreign forum* within sixty days from the rendition of the judgment of dismissal. *Such waiver shall be null and of no effect if such suit is not filed within this sixty-day period. The court may further condition the judgment of dismissal to allow for reinstatement of the same cause of action in the same forum in the event a suit on the same cause of action or on any cause of action arising out of the same transaction or occurrence is commenced in an appropriate foreign forum within sixty days after the rendition of the judgment of dismissal and such foreign forum is unable to assume jurisdiction over the parties or does not recognize such cause of action or any cause of action arising out of the same transaction or occurrence.*

~~The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 or federal maritime law.~~

Section 2. This Act is declared to be remedial, curative, and procedural and therefore is to be applied retroactively as well as prospectively.

* * *

(Emphasis added).

FINDINGS:

The court finds plaintiffs have complied with the earlier order of the court requiring filing in *either* the Philippines *or* Norway. The forum selection clause and the prior order of this court did not require plaintiffs to file in both the Philippines *and* Norway. It is therefore sufficient that the plaintiffs not have to file in Norway when confronted with impediments in the Philippines.

Defendants argue that this court must apply the law of the case and note that the Louisiana Supreme Court has ruled enforcement of the employment contract's forum selection clause to be mandatory. 705 So.2d at 169. This court finds, however, that La.R.S. 23:921(A) as amended presents an issue which was not before the court in prior proceedings. The Louisiana Supreme Court did consider the policy of R.S. 51:1407 (regarding out-of-state telephone solicitors and Louisiana residents) and ruled that that particular statute did not forbid forum selection clauses as they relate to maritime causes of action. *Lejano,* 705 So.2d at 171. However R.S. 23:921(A) articulates a broad public policy against enforcement of forum selection clauses in employment contracts. Therefore the court finds the doctrine of law of the case is not a bar to considering whether the forum selection clause in enforceable where our legislature has since stated a changed public policy in Louisiana.

The Louisiana Supreme Court declared that "the enforcement of a forum selection clause is a procedural matter that is entirely controlled by state law." *Lejano,* 705 So.2d at 164. Article 6 of the Louisiana Civil Code dictates that procedural laws, such as the forum selection clause in question, apply retroactively unless there is a "legislative expression to the contrary." As there is no contrary legislative expression, this court retroactively applies the amendment to R.S. 23:921 to the forum selection clause in the instant employment contract.

Additionally, the court rejects defendants' argument that Lejano ratified the forum selection clause by his acceptance of $40,000.00 Given his necessitous medical circumstances, Lejano's acceptance relates directly to

defendants' obligation to provide continued maintenance and cure to an injured seaman and not to independent ratification of the forum selection clause.

The court finds that enforcement of the forum selection clause in this case contravenes Louisiana's strong public policy against enforcement of such clauses. The United States Supreme Court pronounced that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972). Based on the statutory declaration, the instant forum selection clause is unenforceable.

The *Bremen* Court further held that forum selection clauses are prima facie valid and should be enforced "unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10, 92 S. Ct. at 1913. This court finds plaintiffs have met their burden to show that enforcement of the forum selection clause would be unreasonable under these circumstances. First, the court finds, based on the evidence presented by credible experts Drs. Eugenio Alcazaren and Ernesto Villavert, that Lejano has likely not reached maximum medical cure from his accident-related injuries and that he requires follow-up care to prevent another stroke. The court also accepts the affidavit testimony by Dennis Shafer that Lejano's medical expenses since October 2, 1992 are not being met, i.e. that approximately 794,824 Philippine pesos ("PhP") (US$21,000.00) in medical payments advanced by plaintiffs' counsel have not been reimbursed and that an additional PhP1,000,000 in

unpaid medical bills have been incurred. Accordingly the court expressly finds the denial of medical payments to this seaman to be an unreasonable circumstance rebutting the prima facie validity of the forum selection clause.

The *Bremen* Court also stated that "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." 407 U.S. 18, 92 S. Ct. at 1917. Due to his deteriorating health and the rate at which matters are progressing, plaintiff may well never have his day in court. This court believes that plaintiff has carried his burden to show that trial in the Philippines will be so gravely difficult and inconvenient that he is for all practical purposes being deprived of his day in court.

Second, the taciturn nature of the Philippine courts on the issue of prescription in this case is an unreasonable circumstance when Lejano requires resolution of this cause of action. Based on the medical testimony above, the court finds that Lejano may die before the Philippine courts have resolved this issue. Pursuant to Louisiana Code of Evidence article 202(B)(f), the court takes judicial notice of the law of the Philippines which provides that "[a]ll money claims arising from employee-employer relationships accruing during the affectivity of this Code shall be filed within three (3) years from the time the cause of action accrued; otherwise, the *shall* be forever barred." Labor Code of the Philippines art. 291 (emphasis added). Even under the four-year prescriptive period provided in Philippine Civil Code article 1146, relating to

actions based on injury to rights, the claim has prescribed. The accident occurred on November 7, 1991 and was filed in the Philippines Labor Relations Commission on August 14, 1998, almost seven years later. Applying the above rules to the instant matter, this court finds that the Lejanos' suit has prescribed in the Philippines. The finding is supported by the credible affidavit testimony by former Philippines Supreme Court Justice Emilio A. Gancayco that prescription bars this cause of action in the Philippines and that prescription cannot be waived by the parties. The court takes further notice that a Philippine court can dismiss a case on its own motion on the grounds of prescription even though the private respondents do not present a motion to dismiss the complaint. *Heirs of Plaoldo Miranda v. Court of Appeals, et al.*, 255 SCRA 368, 374. The court also accepts Justice Gancayco's opinion that resolution of the prescription issue in the Philippines will take additional years. Therefore under the *Bremen* rationale, the forum selection clause is unenforceable because its enforcement under these circumstances would be unreasonable.

Defendants seek retroactive application of the *forum non conveniens* amendment and enforcement of this court's earlier dismissal. The 1999 amendment to Code of Civil Procedure article 123, which applies retroactively, broadened the court's discretion to dismiss cases without prejudice based on *forum non conveniens* grounds including those cases involving federal maritime law. A clear reading of the statute however reveals that the court "may dismiss the suit." In other words, the court retains discretion. C.C.P. art. 123(B). The Louisiana Supreme Court recognized the authority of Louisiana courts to

decline application of *forum non conveniens* in maritime cases. *Lejano*, 705 So.2d at 166. Based on the statute and case law, this court will not dismiss this matter on the basis of *forum non conveniens*.

This court expressly finds the Twenty-Fourth Judicial District Court to be the more convenient forum after taking into account where acts giving rise to this cause of action occurred, the convenience of the parties and witnesses and the interests of justice. The accident occurred in international waters off the coast of Florida, and Lejano was subsequently treated in Miami, Florida. The parties have agreed that Lejano was in the course and scope of his employment at the time of the accident. Witnesses to the unresolved issues such as Lejano's medical condition, emergency treatment and the accident investigation are more convenient to this court where *quasi-in-rem* jurisdiction was obtained then [sic] they are to either the Philippines or Norway.

Despite Judge Kollin's *August of 1994* dismissal of this case on *forum non conveniens* grounds, a ruling that was later reversed under the former Code of Civil Procedure article 123, convenience of the parties and interests of justice now dictate a contrary ruling in *April of 2000*. Seamen of all nationalities are wards of the court and are deserving of their day in court.

Article 1, Section 22 of the Louisiana Constitution of 1974 provides as follows:

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, *administered without denial, partiality,*

> *or unreasonable delay*, for injury to him in his person, property, reputation, or other rights.

(Emphasis added). Every plaintiff with a legitimate claim is entitled to his day in court. *Brown v. Globe Tool & Engineering Co.*, 337 So.2d 894 (La.App. 4 Cir. 1976); *Lindsey v. Escude*, 189 So.2d 465 (La.App. 3 Cir. 1966); *Chedotal v. Richard*, 183 So.2d 665 (La.App. 1 Cir. 1966). It is clear that Lejano has a legitimate claim and has attempted to pursue it first in Jefferson Parish and next per the court's order in the Philippines. Thus far the plaintiff's efforts to pursue his claim have been delayed by a mass of procedural hurdles. It is time for a court to hear this case and make a decision. Justice is not served in a game of procedural tennis.

This court therefore reasserts its jurisdiction over this case based on earlier rulings which were conditional. The action of this court is consistent with the procedural safeguards put in place by the Louisiana Supreme Court: "Therefore, Mr. Lejano does have *safeguards against the loss of his day in court* based on any claim of prescription," referring to the court's conditional dismissal. *Lejano*, 705 So.2d at 169 (emphasis added). As earlier stated, the Fifth Circuit anticipated the possibility of prescription in the foreign jurisdictions when it affirmed this court's conditional dismissal. 688 So.2d at 91. The conditional dismissal itself reflected the non-prejudicial intent of this court to provide the parties with their day in court. By setting this case for trial, this matter will be resolved in the near future.

CONCLUSION:

In light of the foregoing reasons, the previous conditional orders of the court and the legislative pronouncement of public policy, plaintiffs' Motion to Set for Trial is hereby GRANTED. This case will be assigned for trial after a duly scheduled status conference.

REASONS READ AND SIGNED, this 27th day of April, 2000.

/s/ Robert M. Murphy
JUDGE

Application For Writs

No. 00-C-1133

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

MAY 20 2000

/s/ [Illegible]
Clerk

FELICIANO LEJANO AND MELINDA LEJANO

VERSUS

K.S. BANDAK, ASSURANCEFORENINGEN GARD, AND GARD (U.K.) LTD

IN RE KS BANDAK, KS BANDAK II, AND ASSURANCEFORENINGEN GARD

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, NUMBER 454-127, DIRECTED TO THE HONORABLE ROBERT M. MURPHY, JUDGE DIVISION "D".

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(SEE ATTACHED) WRIT DENIED

June 30, 2000

FELICIANO LEJANO AND MELINDA LEJANO

VERSUS

K.S. BANDAK. ASSURANCEFORENINGEN

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 00-C-1133

WRIT DENIED

Relator seeks review of the trial court's order setting the above matter for trial in this case. It is well-settled that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Lejano v. Bandak*, 97-0388, (La. 12/12/97), 705 So.2d 158. Enforcement of a forum selection clause is a procedural matter that is entirely controlled by state law. *Lejano v. Bandak, supra*, citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Forum selection clauses can be invalidated if enforcement is shown to be unreasonable and unjust. *Id.*

The trial court found that Lejano has made the requisite *Bremen* showing that trial in the Philippines will be so gravely difficult and inconvenient that he is for all practical purposes deprived of his day in court. The court apparently determined that failure to move the case to a conclusion has resulted in the failure of the defendant to

meet the medical expenses of Mr. Lejano. This finding is based on circumstances not previously discussed or determined by the Supreme Court and on the showing made, we find no manifest error in that determination.

Lejano has "safeguards against the loss of his day in court based on any claims of prescription". *Lejano v. Bandak, supra.* The court found that the issue of prescription under Philippine law is, in essence, unpredictable under the circumstances of this case, and that enforcement of the forum selection clause would be unreasonable. On the showing made we find no abuse of discretion. See *Tomas Reyes Cabahug, Jr. v. Text Shipping Company, Ltd.; Apollo Shipping Ltd.; and United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.*, 98 CA 0786 (La. 1st Cir. 5/12/2000), WL 641098 for a similar determination. Enforcement of a forum selection clause under these circumstances would be based on speculation. *Cabahug, supra.*

Further, under LSA-C.C.P. art. 123, the court has discretion to dismiss based on *forum non conveniens.* We see no abuse of discretion in the refusal of the trial court to dismiss the matter under this article.

Gretna, Louisiana, this 30th day of June, 2000.

/s/ Marion E. Edwards
JUDGE MARION E. EDWARDS

/s/ Charles Grisbaum, Jr.
JUDGE CHARLES GRISBAUM, JR.

/s/ Clarence E. McManus
JUDGE CLARENCE E. McMANUS

9 U.S.C. § 1 **"Maritime transactions" and "commerce" defined; exceptions to operation of title**

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of the controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2 **Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contact evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C § 3 **Stay of proceedings where issue therein referable to arbitration**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4 **Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the

making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5 Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be

followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 6 **Application heard as motion**

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7 **Witnesses before arbitrators; fees; compelling attendance**

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the

same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8 **Proceedings begun by libel in admiralty and seizure of vessel or property**

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9 **Award of arbitrators; confirmation; jurisdiction; procedure**

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the

award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10 **Same; vacation; grounds; rehearing**

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

a. Where the award was procured by corruption, fraud, or undue means.

b. Where there was evident partiality or corruption in the arbitrators, or either of them.

c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to

the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

d. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

e. Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 11 **Same; modification or correction; grounds; order**

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evidence material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12 **Notice of motions to vacate or modify; service; stay of proceedings**

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13 **Papers filed with order on motions; judgment; docketing; force and effect; enforcement**

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or

umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the some force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14 **Contracts not affected**

This title shall not apply to contracts made prior to January 1, 1926.

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9 U.S.C. § 201 **Enforcement of Convention**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or

which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the county where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of foreign Arbitral Awards of 1927 (27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the State of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the

appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary General of the United Nations,

declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with Article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Done at New York June 10, 1958: entered into force for the United States December 29, 1970, subject to declarations.

Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 USC 201-208

States which are parties:

* * *

United States (Footnote 58)

* * *

[FN 58] "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

* * *

9 U.S.C. § 202 Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 203 Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount of controversy.

9 U.S.C. § 204 Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for

the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

9 U.S.C. § 205 **Removal of cases from State courts**

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provide by law shall apply, except that ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C. § 206 **Order to compel arbitration; appointment of arbitrators**

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court

may also appoint arbitrators in accordance with the provisions of the agreement.

9 U.S.C. § 207 **Award of arbitrators; confirmation; jurisdiction' proceeding**

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 208 **Chapter 1; residual application**

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States.